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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1901~~ 1902.

No ~~195~~ 98.

W. T. WAGGONER, PLAINTIFF IN ERROR,

vs.

J. M. FLACK.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

FILED AUGUST 27, 1900.

(17,890.)

(17,890.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No 405

W. T. WAGGONER, PLAINTIFF IN ERROR,

vs.

J. M. FLACK.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

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1 *Transcript from District Court.*

Caption.

THE STATE OF TEXAS, }
County of Wilbarger. }

At a term of the district court begun and holden at Vernon, within and for the county of Wilbarger, before the Hon. G. A. Brown, and ending on the 1st day of October, A. D. 1898, the following case came on for trial, to wit:

W. T. WAGGONER, Plaintiff, }
vs.
J. M. FLACK ET AL., Defendants. }

Plaintiff's Amended Original Petition. Filed Sept. 24, 1898.

In District Court, Wilbarger County, Sept. Term, 1898.

W. T. WAGGONER }
vs. } No. 1394.
J. M. FLACK ET AL. }

Now comes plaintiff and, by leave of the court first obtained, files this his amended original petition amending his original petition filed herein on 27th April, 1898, and for such amended petition says:

1st. That on 1st day of Feb'y, 1898, he, plaintiff, was owner in fee-simple and entitled to the possession of the land hereinafter described; that on or about the 4th day of Feb'y, 1898, defendant J. M. Flack unlawfully entered upon said land and premises hereinafter described and ejected plaintiff therefrom and dispossessed plaintiff of same, and now unlawfully with-olds from plaintiff the possession thereof, to plaintiff's damage $2,500; that the land and premises owned by plaintiff and from which he has been so unlawfully ejected by defendant J. M. Flack, as aforesaid, are described, viz: Section No. 60, block No. 4, H. & T. C. R. R. Co. survey Wilbarger county, Texas, certificate No. 1048; by metes and bounds: Begin at a stone marked N. W. cor. 59, from which a stone mound on top of a peak bears S. 39¼ W., the N. W. cor. No. 59 and
2 the N. E. cor. this survey; thence S. 72 W. 1,900 vrs. a stone set in the ground marked N. W. 60, the N. W. cor. this survey and the N. E. cor. 48, block 2, from which a stone mound on the top of a peak brs. S. 8 50 E.; thence S. 18 E. 1,900 vrs. a stake, mound, and 4 pits, the N. E. cor. 45 and the S. W. cor. this survey and the N. E. cor. No. 47, block 2; thence N. 72 E. 960 vrs. head of ravine at 1,900 vrs., the S. W. cor. of 59 and the S. E. cor. of this survey; thence N. 18 W. 1,900 vrs. to the place of beginning, containing 640 acres of land, more or less.

Plaintiff avers that F. M. Flack is a mythical person in whose

name application was made by J. M. Flack to purchase this land, and plaintiff now dismisses as to said F. M. Flack.

Plaintiff avers that said land is worth the sum of $2,500. Plaintiff further avers that defendant J. M. Flack has, without his consent and without legal right, pastured stock on said ground from said 4th day of Feb'y until now, as follows: about 40 head of cattle and about 30 head of horses, said pasturage being reasonably worth about 30 cents per month for horses and about 20 cents per month for cattle, and, though often requested to pay plaintiff for said pasturage, defendant J. M. Flack has wholly neglected and refused to do so, and plaintiff asks judgment for such pasturage, and also for title and possession of the land above described, for costs of suit, for writ of possession, and for such other relief as the law and facts warrant.

A. A. HUGHES,
F. P. McGHEE,
Att'ys for Pl'ff.

Plaintiff, by way of second count, alleges that on or about the 20th day of August, 1898, he was the owner of the land above set forth and described and was entitled to the possession of the same; that afterwards, on the 22nd day of August, 1898, defendant J. M. Flack unlawfully entered upon said land and ejected plaintiff therefrom, and now unlawfully withholds from plaintiff the possession thereof, to plaintiff's damage $2,500.

3 That the land in controversy in this suit is worth the sum of $2,500, and plaintiff prays judgment for the title and possession of said land, for writ of possession, and costs of suit.

A. A. HUGHES,
F. P. M'GHEE,
Att'ys for Pl'ff.

Filed Sept. 24th, 1898.

W. B. TOWNSEND, *Dist. Clk.*

Defendants' Original Ans. Filed Sept. 5, 1898.

W. T. WAGGONER vs. J. M. FLACK. No. 1394. Suit Pending in the District Court of Wilbarger County, Tex., Sept. Term, 1898.

Now comes the defendant- in the above entitled and numbered cause and demurs to plaintiff's original petition herein for the reason that it fails to allege facts sufficient to constitute a cause of action, and of which *he* prays the judgment of the court.

And for answer herein defendants deny all and singular the allegations in plaintiff's petition contained and demand strict proof thereof, and of which they put themselves upon the country.

And defendants, further answering, say they are not guilty of the trespasses and wrongs and damages alleged in the plaintiff's said petition, and of which they put themselves upon the country.

J. A. LUCKY,
Att'y for Defendant-.

Filed Sept. 5th, 1898.

W. B. TOWNSEND, *Dist. Clk*,
By C. P. SMITH, *Dep.*

4 *Judgment of Court.*

W. T. WAGGONER
vs.
J. M. FLACK ET AL. } No. 1394.

SEPT. 29TH, 1898.

On this day this cause was called for trial and the plaintiff appeared in person and by attorney and announced ready for trial; and the defendant J. M. Flack appeared in person and by attorney and announced ready for trial. The plaintiff dismissed his suit herein against F. M. Flack, and he goes hence without day and is not required to answer further herein. The jury being waived and the matters of fact as well as of law being submitted to the court, who, after hearing the pleadings read and the introduction of evidence and argument of counsel, is of opinion that the law and facts are in favor of the defendant J. M. Flack, and that he should recover the title and possession of the land and premises in suit herein.

It is therefore considered, ordered, and adjudged by the court that the plaintiff, W. T. Waggoner, take nothing by his suit herein, and that the defendant J. M. Flack be quieted in his title and possession of the land and premises in suit herein and described as follows, to wit: Situated in Wilbarger county, Texas, and being all of section No. 60, in block No. 4, H. & T. C. R. R. Co.'s survey, in Wilbarger county, Texas, surveyed for common-school fund, by virtue of certificate No. 1048, issued to said R. R. Co., and for which he may have his writ of possession. It is further ordered that the plaintiff pay all costs in this suit incurred, for which execution may issue to collect the same.

5 *Motion for New Trial. Filed Sept.* 29, 1898.

In District Court of Wilbarger County, Texas, Sept. Term, 1898.

W. T. WAGGONER
vs.
J. M. FLACK ET AL. } No. 1394.

Now comes plaintiff and moves the court to set aside its judgment herein rendered against him and to grant him a new trial on the following grounds:

1st. Defendant J. M. Flack had no right to the land in suit, and plaintiff had the right under act of 1897 to reinstate the account, for he tendered all the interest due the State, both on 16th Dec., 1897, and also on 13th August, 1898, to State treasurer on written application, and said forfeiture of Aug. 20th, 1897, of rights of D. B.

Phillips, under whom plaintiff claims, was premature, for act of 1897 had gone into effect, and said forfeiture could not be legally made prior to 1st Nov., 1897.

2nd. Act of legislature of 1885, Feb'y 23rd, declaring no forfeiture could be made on account of non-payment of installment of interest, was in full force when D. B. Phillips, under whom plaintiff claims, purchased this land, and this act was a part of and entered into the contract of purchase between the State of Texas and said Phillips, and the act of the legislature of Texas, page 39 of said acts, which took effect 20th August, 1897, or any other act that attempts to forfeit the right of Phillips and those under whom he claims, in a summary manner, as is shown in this cause, without a day in court, is unconstitutional and void and is prohibited by the Constitution of the United States, which provides that no State shall pass any law that impairs the obligation of a contract, and plaintiff contends that this act of 1897, under which this forfeiture was attempted to be made, violates section 10 of the Constitution of the United States, because it is a law impairing the obligation of the contract between D. B. Phillips and the State, and plaintiff succeeds to the rights of D. B. Phillips to the land.

W. W. FLOOD,
A. A. HUGHES,
F. P. M'GHEE,
Att'ys for Pl'ff.

Filed Sept. 29th, 1898.

W. B. TOWNSEND, *Dist. Clk.*
By C. P. SMITH, *Dep.*

6 *Order Overruling Motion for New Trial.*

W. T. WAGGONER
vs.
J. M. FLACK. } No. 1394.

SEPT. 29TH, 1898.

This day came on to be heard plaintiff's motion for a new trial, and the court doth overrule same. To this action of the court plaintiff duly excepted and in open court gave notice of appeal to the court of civil appeals for the second supreme judicial district of Texas, at Fort Worth, Texas, and on application of plaintiff ten days are allowed him in which to prepare, have approved, and filed a statement of facts herein.

Statement of Facts. Filed Oct. 5, 1898.

In District Court, Wilbarger County, Texas, September Term, 1898.

W. T. WAGGONER
vs.
J. M. FLACK. } No. 1394.

We, the attorneys for the plaintiff and defendant, agree that the facts in this case are:

That D. B. Phillips, under the act of 1883 as modified by act of Feb'y 23rd, 1885, on 30th of October, 1885, made application, in compliance with the ruling of the State land board of Texas, to purchase the land in controversy, and that said land was duly awarded to him in November, 1885, and that in November, 1885, said Phillips actually settled upon said land in compliance with his said application and cultivated a portion of same during the spring and summer of 1886; that he actually settled on the land in compliance with the law, and that all irregularities in sale of same by land board were validated by acts of 1889, 1891 of the legislature of Texas; that plaintiff is owner of this D. B. Phillips interest in said land by means of conveyances duly executed; that the
7 land was awarded to D. B. Phillips at $2.00 per acre on 30 years' time and interest at five per cent. per annum on all deferred payments; that $\frac{1}{20}$ of the principal on the D. B. Phillips purchase on contract of purchase was paid by him, and all interest payments have been made by him or those claiming under him up to 1st day of January, 1893; that no interest was thereafter paid on said purchase; that on 16th day of December, 1897, J. E. Lutz had City National Bank of Austin, Texas, said Lutz acting as agent for plaintiff Waggoner, to tender the state treasurer $286.95, to pay up the back interest due on said section, and wrote a letter to commissioner of general land office, dated Dec. 15th, 1897, asking the reinstating of the account of D. B. Phillips, and forwarded the transfers or deeds or copies of same showing a chain of title from D. B. Phillips to plaintiff Waggoner, and said transfers were filed by the commissioner of general land office in his office, but commissioner refused to reinstate on the ground that the rights of defendant J. M. Flack had intervened.

J. M. Flack claims as follows: The land was forfeited for non-payment of interest by the commissioner of the general land office of the State of Texas, without any judicial procedure or suit in court, on the 20th day of August, 1897. The land was appraised by the commissioner's court after its forfeiture at $1.00 per acre, and such reclassification approved by the commissioner of general land office, and the list of forfeited lands for resale, including the section in controversy, was filed by Co. clerk of Wilbarger county on 15th day of September, 1897, and recorded by said clerk, in the book kept by him for that purpose, on 16th day of September, 1897. J. M. Flack, on the 17th day of Nov., 1897, made his application in due

form to purchase this land as additional land, he then owning a half section of school land within 1 mile of this land, on which he was then living with his family, as required by law. On this application the land was awarded to J. M. Flack, defendant, in March,
1898, on his application above mentioned, dated Nov. 17th,
8 1897. The sale to J. M. Flack, dat*ing* Nov. 17th, 1897, the application, and the obligation for the balance of the purchase-money being in due form of law, *and* were accepted by the commissioner of the general land office, and the land was awarded to defendant by said commissioner on defendant's aforesaid application. On 13th day of August, 1898, after this suit was brought, but before filing his amended petition, plaintiff, through his att'y, F. P. M'Ghee, made written application to have the D. B. Phillips account for purchase of this land reinstated, and for this purpose tendered the state treasurer of Texas, to pay up the back interest, the sum of $345.25, which application was rejected by commissioner on the grounds of the intervening rights of defendant J. M. Flack. The amount of interest per annum on the D. B. Phillips obligation, at 5 per cent. per annum, is $61.87, and said sum of $345.25 was a sufficient sum to pay up back interest to date of the application of plaintiff's att'y, M'Ghee, to reinstate, to wit, up to 13th Aug., 1898. On these facts the legal contention arises as to who has the better title to the land in suit.

A. A. HUGHES,
W. W. FLOOD, AND
F. P. M'GHEE,
Att'ys for Plaintiff.
J. A. LUCKY,
Att'y for Defendant.

The foregoing statement of facts examined, approved, and ordered filed this Oct. 3rd, 1898.

G. A. BROWN,
District Judge.

Filed Oct. 5th, 1898.

W. B. TOWNSEND, *Dist. Cl'k,*
By C. P. SMITH, *Dep.*

9 *Appeal Bond. Filed Oct.* 13, 1898.

W. T. WAGGONER vs. J. M. FLACK ET AL. } No. 1394. Suit Pending in the District Court of Wilbarger County, Texas, Sept. Term, 1898.

Whereas in the above numbered and entitled cause, pending in the district court of Wilbarger county, Texas, and at a regular term of said court, to wit, on the 29th day of September, A. D. 1898, the plaintiff, W. T. Waggoner, having before trial on said day dismissed his suit herein as to one of the defendants, to wit, F. M. Flack, as appears of record in said judgment, and a jury being waived, the

court on said day rendered its judgment against the plaintiff, W. T. Waggoner, and in favor of the defendant J. M. Flack as follows:

"It is therefore considered, ordered, and adjudged by the court that the plaintiff, W. T. Waggoner, take nothing by his suit herein, and that the defendant J. M. Flack be quieted in his title and possession of the land and premises in suit herein and described as follows, to wit: Situated in Wilbarger county, Texas, and being all of section No. 60, in block No. 4, H. & T. C. R'y Co.'s surveys in Wilbarger county, Texas, surveyed for the common-school fund by virtue of certificate No. 1048, issued to said R. R. Co., and for which he may have his writ of possession.

"It is further ordered that the plaintiff pay all costs in this behalf incurred, for which execution may issue to collect the same."

From which said judgment the said W. T. Waggoner, plaintiff, as aforesaid, has taken an appeal to our court of civil appeals for the second supreme judicial district of Texas, and desires to suspend the execution of said judgment during the pendency of said appeal:

Now, therefore, we, the said W. T. Waggoner, appellant, as principal, and T. M. Holt and J. H. Housels, as sureties, acknowledge ourselves bound to pay to J. M. Flack, appellee, the sum of eight hundred dollars, a sum at least double the amount of costs of the suit in the court of civil appeals, supreme court, and the court below, as estimated by the clerk, conditioned that the said W. T. Waggoner, appellant, shall prosecute his appeal with effect and shall pay all costs which have accrued in the court below (the district court of Wilbarger county, Texas) and which may accrue in the court of civil appeals and the supreme court in said cause, and further conditioned that the appellant, W. T. Waggoner, shall, in the case the judgment appealed from is affirmed, pay to the appellee J. M. Flack the value of the rent or hire of the land in suit in any suit which may be brought therefor.

Witness our hands this 8th day of October, 1898.

W. T. WAGGONER, *Principal*,
By F. P. M'GHEE, *His Att'y.*
T. M. HOLT.
J. H. HOUSELS.

I have fixed probable amount of costs in this cause in district court, court of civil appeals, and supreme court at one hundred and twenty-five dollars, and have approved this bond this 13th day of October, 1898.

Approved this 13th day of October, 1898.

[L. S.]

W. B. TOWNSEND, *Dist. Clk*,
By C. P. SMITH, *Dep.*

Filed October 13th, 1898.

W. B. TOWNSEND, *Dist. Clk*,
By C. P. SMITH, *Dep.*

Assignment of Errors. Filed Oct. 13, 1898.

W. T. Waggoner vs. J. M. Flack. } No. 1394. Suit Pending in the District Court of Wilbarger County, Texas, Sept. Term, 1898.

Now comes W. T. Waggoner, appellant herein, and submits and assigns the following as errors committed on the trial of said cause in the district court of Wilbarger county:

1st. There was error in the judgment of the court for the defendant (the appellee herein) in this: The application and file
11 on the land in controversy by D. B. Phillips (under whom appellant claims) was made and accepted at a time when the law vouchsafed to him that no summary forfeiture of his purchase could be made by the commissioner of the general land office, as had heretofore been authorized, nor by any other person, for failure to pay interest on his obligation to purchase, and the subsequent act of the legislature under which the commissioner of the general land office sought to make and did make a summary forfeiture of the land in controversy for failure to pay interest on his purchase, and under which the application to purchase and file of the appellee was made and accepted, is void in that it contravenes the Constitution of the United States wherein it inhibits any State from passing any law impairing the obligation of a contract, as well as the constitution of the State of Texas in same respect.

2nd. There was error in the judgment of the court for the defendant in this: The commissioner of the general land office had no authority under the law to declare a forfeiture of the obligation to purchase the land in controversy by D. B. Phillips at the time the same was done.

3rd. There was error in the judgment of the court for the defendant in this: The appellant, as the legally authorized claimant of the land in controversy under D. B. Phillips, tendered to the treasurer of the State of Texas the interest on his obligation to purchase, then past due, within the time allowed him by law, and was thereby entitled to have the account of the said Phillips reinstated, and no legal intervening right could have been acquired in the meantime.

4th. There was error in the judgment of the court for the defendant in this: In the obligation to purchase the land in controversy by D. B. Phillips time was not of the essence of the contract, and no valid rescission of the contract could have been summarily made by the commissioner of the general land office in such case
12 as was attempted to have been done by the commissioner in declaring said contract forfeited and placing the land again on the market for sale.

5th. There was error in the judgment of the court for the defendant in this: Because if the time had been of the essence of the contract in this obligation to purchase the land in controversy by D. B. Phillips, in the failure to pay the interest thereon at stipulated periods, same had been waived in extending the time in which such

payment was to be made, and in such case there could have been no valid rescission of such contract in the summary method attempted by the commissioner of the general land office in this behalf.

F. P. M'GHEE,
FLOOD, HUGHES & FOSTER,
Att'ys for Appellant, W. T. Waggoner.

6th. There was error in the judgment of the court for the defendant in this: The commissioner of the general land office could not legally forfeit this purchase, because 1st of Nov., 1897, had not arrived, but same was attempted to be made on the 20th of August, 1897. This act of the legislature is unconstitutional and void, being contrary to the Constitution of the United States, as above stated, and plaintiff made his written application to reinstate D. B. Phillips' account and tendered the treasurer all sums due up to date of tender.

F. P. M'GHEE,
FLOOD, HUGHES & FOSTER,
Att'ys for Appellant, W. T. Waggoner.

Filed Oct. 13th, 1898.

W. B. TOWNSEND, *Dist. Cl'k,*
By C. P. SMITH, *Dep.*

13 *Bill of Costs.*

Filing & dock. cause	.35
Appearances	.45
1 cit. & 2 copies	2.25
Fil. int'*ys* to A. J. Baker	.15
2 cert. copies int'*ys* to Baker	3.40
2 precepts to serve same	2.25
Fil. cross-int'*ys* to B	.15
Cert. copy D. & cross	2.50
1 com	.75
1 cit. & copy to J. M. Flack	1.50
Com. to take dep. J. M. F	.75
Fil. int'*ys* above	.15
Ent. judgment	1.00
Assessing damages	.50
Taxing costs & copy	.25
Fil. & dock. motion	.35
Order on motion	.75
Fil. & dock. motion for new trial	.35
Order O. R. motion	.75
1 aff. and seal	.50
1 subp. and 1 add. name	.40
Fil. statement of facts	.15
Swearing 4 witnesses	.40
Fil. answer	.15
Fil. 19 papers	2.85
Transcript	8.35

Fil. brief	.15
Cert. of brief filed	.75
Fil. & approving appeal bond	1.65
	$33.95

Sheriff's Costs.

1 citation and mil	3.10
One precept & mil	2.60
2 wit. & mil	1.10
	$6.80

Witness Fees.

J. T. Estes	2.80

Notary Fee.

J. E. M. Hedley	1.50

Recapitulation.

Clerk	33.95
Sheriff	6.80
Witness	2.80
Notary	1.50
Total	$45.05

Clerk's Certificate.

THE STATE OF TEXAS, }
County of Wilbarger. }

I, W. B. Townsend, clerk of the district court in and for Wilbarger county, Texas, do hereby certify that the above and
14 foregoing transcript contains a true and correct copy of all the proceedings had in the case of W. T. Waggoner *vs.* J. M. Flack, cause No. 1394 on the docket of said court, and that the above is a true and correct bill of costs in said cause.

Given under my hand and seal of office, at town of Vernon, Texas, this the 27th day of October, 1898.

[L. S.]

W. B. TOWNSEND,
Clerk of District Court, Wilbarger County, Texas,
By C. P. SMITH, *Deputy.*

Indorsement on Transcript.

The foregoing transcript is indorsed as follows: No. 3206. W. T. Waggoner, appellant, *vs.* J. M. Flack, appellee. From the dist. court of Wilbarger county. Applied for by F. P. McGhee, attorney for appellant, on the 26th day of Oct., 1898, and delivered to F.P. McGhee on the 27th day of Oct., 1898. W. B. Townsend, clerk dist. court, Wilbarger county. Filed in court of appeals at Ft. Worth, Texas, the 3rd day of Dec'b'r, 1898. W. L. Huff, clerk court of appeals.

Order of Submission in Court of Civil Appeals.

April 8, 1899.—Cases submitted:
3201, A. J. Anderson *vs.* S. A. Sessions.
3203, Montague Co. *vs.* I. A. Meadows, guar.
3204, Hurlbut & Jones *vs.* W. H. Bush.
3205, Tex. & Pac. R'y Co. *vs.* Truesdale & Gardner.
3206, W. T. Waggoner *vs.* J. M. Flack.
3163, Morgan Jones, rec'r, *vs.* John D. Roach.
3160, C. B. Quaid *vs.* L. D. Tipton.

15 *Answer of Supreme Court to Certified Questions.*

W. T. WAGGONER *vs.* J. M. FLACK. } No. 794. Certified Questions from Second District.

The court of civil appeals for the second supreme judicial district has certified to this court the following statement and questions:

"The section of school land in controversy was first sold in November, 1885, at $2 per acre and on thirty years' time, to D. B. Phillips, who transferred his right to appellant. The law was complied with in this purchase and all interest paid to January 1, 1893. On August 20, 1897, no further payments having been made, the commissioner of the general land office entered a forfeiture for non-payment of interest, and after reclassification and appraisement at $1 per acre, in September, 1897, again put the land upon the market. In November following appellee made application to purchase it as an actual settler upon another piece of school land within the prescribed radius, complying in all things with the law. Consequently, in March, 1898, the land was awarded to him. In the judgment appealed from, the action of the commissioner in declaring the forfeiture and in awarding the land to appellee was approved, and the recovery of the land sought by appellant was denied.

"We therefore deem it advisable to certify to your honors for decision the question whether or not, under any law in force on August 20, 1897, the commissioner of the general land office, at any time before November, 1897, was authorized to declare a forfeiture for the non-payment of interest due since the year 1894; that is to say, whether or not the forfeiture act of 1897 (Acts of 1897, p. 39), which went into effect August 20, 1897, authorized any forfeitures until after the first of November of that year; and, if it did not, then whether its enactment had the effect to repeal section 11 of the law of 1895, so as to prevent a forfeiture, as provided in that section, for interest falling due and remaining unpaid during the
16 years 1894, 1895, or 1896."

The act of the legislature entitled "An act to authorize the commissioner of the general land office to forfeit all lands heretofore sold by the State, under any of the various acts of the legislature, for failure to pay any portion of the interest thereon," approved March 25, 1897 (Gen. Laws 1897, p. 39), empowered the commissioner of

the general land office to declare forfeiture of any sales of the public-school lands made before the passage of the act, if any portion of the interest theretofore due upon the first day of November of any year remained unpaid, and also to declare such forfeiture in case any portion of the interest on such sales which might become due on the first day of any succeeding November should remain unpaid. In other words, this law applies only to lands sold prior to its enactment, but embraces payments of interest already due, as well as those to become due on such sales.

It is declared in the act that it is cumulative; hence it does not conflict with any other law upon this subject, but was intended to supply an authority claimed not to exist as to some of the sales, by covering the whole field from the beginning of such sales down to the date of the law. The emergency clause reads as follows: "The fact that the authority of the land commissioner to make forfeitures of land without judicial ascertainment has been questioned, and the fact that there are now more than ten thousand purchases which can be forfeited under the law for non-payment of the interest due thereon, and the further fact that it is almost impossible and certainly impracticable to institute so many different suits against so many different purchasers, creates an imperative public necessity requiring the suspension of the rule providing that bills be read on three several days, and the same is hereby suspended." The declared necessity for the law shows that its purpose was to dispel any doubt of the power of the commissioner to enforce the State's right to forfeit all sales theretofore made, and by explicit terms to
17 authorize the commissioner to enforce the existing rights of forfeiture for a failure to pay interest which had accrued anterior to the passage of the law, as well as for that which might accrue at a date subsequent to its enactment. This law does not repeal the eleventh section of the general law of 1895 upon the same subject.

T. J. BROWN,
Associate Justice.

Opinion delivered May 22, 1899.

CLERK'S OFFICE SUPREME COURT.

I, Chas. S. Morse, clerk of the supreme court of Texas, hereby certify that the foregoing two pages contain a true and correct copy of the opinion of the supreme court of Texas in cause No. 794, entitled W. T. Waggoner *v.* J. M. Flack (certified questions from 2nd district).

Witness my hand and the seal of said court this the 17th
[L. S.] day of June, A. D. 1899.

CHAS. S. MORSE, *Clerk*,
By F. T. CONNERLY, *Deputy.*

MAY 22ND, 1899.

W. T. WAGGONER vs. J. M. FLACK. } No. 794. Certified Questions from Second District.

Opinion delivered by Associate Justice Brown:

"It is ordered by the court that a copy of the opinion herein delivered be certified to the court of civil appeals for the second supreme judicial district, and that said cause be therein proceeded with in accordance with said opinion."

I, Charles S. Morse, clerk of the supreme court of Texas, hereby certify that the above is a true and correct copy of the order
18 made by the supreme court in the above styled and numbered cause.

Witness my hand and the seal of said court this the 17th
[L. S.] day of June, A. D. 1899.

CHAS. S. MORSE, *Clerk*,
By F. T. CONNERLY, *Deputy*.

Filed in court of civil appeals June 19, 1899.

W. L. HUFF,
Clerk 2nd Supreme Judicial District.

Certified Copy of Bill of Costs in Supreme Court.

CLERK'S OFFICE, SUPREME COURT.

W. T. WAGGONER vs. J. M. FLACK. } No. 794. Willbarger Co. Certified Copy Bill of Costs in Supreme Court.

Filing record	.50
Docketing cause	.50
Entering appearances	.50
Filing briefs, 2	.60
Filing 1 extra papers	.30
Entering judgment	1.00
Taxing costs	.50
Certified copy of bill of costs	1.00
Recording opinion	1.50
Certified copy of opinion	1.50
Orders	1.00
2 notices to counsel	2.00
Cert. copy judg. to C. C. A	1.00
Total	$11.90

I, Charles S. Morse, clerk of the supreme court of Texas, hereby certify that the above copy of the original bill of costs is true and correct.

Witness my hand and the seal of said court, at Austin, [L. S.] this the 17th day of June, 1899.

CHAS. S. MORSE, *Clerk.*

Filed in court of civil appeals June 19, 1899.

W. L. HUFF,
Clerk 2nd Supreme Judicial District.

19 *Opinion of Court of Civil Appeals.*

W. T. WAGGONER, Appellant,
vs.
J. M. FLACK, Appellee. } No. 3206.

From the district court of Wilbarger county.

Conclusions.

The section of school land in controversy was first sold in November, 1885, at $2 per acre and on thirty years' time, to D. B. Phillips, who transferred his right to appellant. The law was complied with in this purchase and all interest paid to January 1, 1893. On August 20, 1897, no further payments having been made, the commissioner of the general land office entered a forfeiture for non-payment of interest, and, after reclassification and appraisement at $1 per acre, in September, 1897, again put the land upon the market. In November following appellee made application to purchase it as an actual settler upon another piece of school land within the prescribed radius, complying in all things with the law. Consequently, in March, 1898, the land was awarded to him.

Appellant made two attempts to have the original purchase reinstated, one in December, 1897, and the other pending this suit, tendering in each instance the arrears of interest, but both offers were rejected by the commissioner because of the intervening rights of appellee.

It is thus seen that this case comes within the scope of the decision of our supreme court in the case of Fristoe *v.* Blum, 45 S. W. Rep., 998. True, the sale in that case was made under the law of 1883, which contained a forfeiture clause, but which clause, it is contended, had been repealed when the original sale in this case was made, in November, 1885; but in the opinion referred to this differ-
20 ence was treated as immaterial, as the decision was expressly placed upon the ground that it was within the power of the legislature to authorize the commissioner of the land office to declare forfeitures for non-payment of interest in all such cases without reference to the law under which the rights of purchasers accrued. We are therefore constrained by the opinion of our supreme court in Fristoe *v.* Blum to overrule the main contention of appellant in this case.

The contention that he was entitled to have a reinstatement of the original purchase is overruled by article 4218*f* of the act of 1897, page 185, 2 Sayles' Civil Statutes of 1897, which authorizes the com-

missioner of the land office to make such reinstatement only in cases where "no rights of third persons may have intervened."

The further contention that the forfeiture was invalid is overruled by the opinion of our supreme court on the question certified in this case.

The judgment is affirmed.

STEPHENS,
Associate Justice.

Filed in court of civil appeals June 24, 1899.

W. L. HUFF,
Clerk 2nd Supreme Judicial District.

Judgment of Court of Civil Appeals.

W. T. WAGGONER vs. J. M. FLACK. } 3206. From Dist. Court, Wilbarger County.

Opinion by Mr. Stephens, A. J.

JUNE 24, 1899.

This cause came on to be heard on a transcript of the record, and, the same being inspected, because it is the opinion of this court that there was no error in the judgment, it is therefore considered, and so ordered, adjudged, and decreed, that the judgment of the court
21 below be in all things affirmed; that the appellant, W. T. Waggoner, and his sureties, T. M. Holt and J. H. Housels, pay all costs in this behalf expended, and that this decision be certified below for observance.

Motion for Rehearing.

In the Court of Civil Appeals, Second Supreme Judicial District, Fort Worth, Texas.

W. T. WAGGONER, Appellant, vs. J. M. FLACK, Appellee. } No. 3206.

Appealed from the district court of Wilbarger county, Texas.

Appellant's Motion for Rehearing.

Now comes the appellant, W. T. Waggoner, and moves the court to set aside the judgment rendered in this cause on the 24th day of June, 1899, and grant him a rehearing herein for the following reasons, to wit:

I.

Because the court erred in overruling appellant's 1st assignment of error, to the effect that the forfeiture made by the commissioner of the general land office in August, 1897, is void, in that it contravened the Constitution of the United States, which inhibits any

State from passing any law impairing the obligation of a contract, as well as the constitution of the State of Texas to the same affect, because this land was purchased from the State of Texas under the law regulating the sale of school land, enacted in 1885, which expressly provides that in any sales of school land made under that law no forfeiture should be allowed for failure to pay interest, and the act of 1887 and all other acts authorizing the land commissioner to forfeit the sale of school lands for the non-payment of interest, passed subsequent to the act of 1885, would impair the obligation of all contracts of sale made under the acts of 1885, and there-
22 fore, in so far as it relates to sales made under said act, said laws are unconstitutional and void.

II.

Because the court erred in not sustaining appellant's second assignment of error to the effect that the commissioner of the general land office had forfeited the land in controversy for failure in the payment of interest at a time when he was not authorized by law to do so, because the act of 1897 gave appellant until the 1st of November to pay all interest in arrears, and only provided for a forfeiture for the non-payment of interest after the 1st of November, 1897, when this forfeiture was made in August, 1897.

III.

Because the court erred in not sustaining appellant's 3rd assignment of error, to the effect that the appellant tendered to the treasurer of the State of Texas past-due interest within the time allowed by law, and therefore no rights of third parties could have intervened, because appellant did tender all interest in arrear within the 90 days given him by law.

IV.

Because the court erred in not sustaining appellant's 4th assignment of error, to the effect that since time was not the essence of the contract of sale by the State of the land in controversy, the State had no right to rescission or forfeiture, and the act of 1887 could give the State no such right without impairing the obligation of contract-, because the acts of the legislature of 1885 regulating the sale of school lands expressly provided that the time for payment of interest was not the essence of contract, and unless time is of the essence of the contract no right of rescission or forfeiture exists in the vendor, and therefore, in so far as applied to this sale, the law authorizing rescission would be invalid because it would impair the obligation of contract made between Phillips and the State.

23 V.

Because the court erred in not sustaining appellant's 5th assignment of error, to the affect that the State had waived its right by extending the time for the payment of the annual installments of interest, because the State, since the year 1893, when default of in-

terest was made on the land in controversy, has repeatedly extended the time for the payment of said interest and thereby waived its right of forfeiture.

VI.

Because this court erred in holding that the opinion of the supreme court in Frist-e *vs.* Blum is decisive of the question in this case, since in that case the court held that the right of rescission existed in the State at all times, and that the subsequent acts of the legislature only authorized the commissioner of the general land office to carry that right into effect. In this case, as no right of rescission exists under the contract, the legislature had no authority to confer that right upon the land commissioner.

W. W. FLOOD &
A. A. HUGHES,
Att'ys for Appellant.

Filed in court of civil appeals July 7, 1899.

W. L. HUFF,
Clerk 2nd Supreme Judicial District.

Order on Motion for Rehearing.

W. T. WAGGONER
vs.
J. M. FLACK. } 2915, 3206.

OCTOBER 14, 1899.

This day came on to be heard the motion of appellant for a rehearing in this cause, which, having been heard and considered by the court, is overruled.

24 *Application to Supreme Court for Writ of Error.*

In Supreme Court of Texas.

W. T. WAGGONER, Plaintiff in Error,
vs.
J. M. FLACK, Defendant in Error. } In the Supreme Court of the State of Texas.

Application for writ of error.

To the honorable supreme court of the State of Texas:

Now comes W. T. Waggoner, who resides in Wise county, Texas, and herein styled plaintiff in error, and prays this court for a writ of error to the court of civil appeals for the second supreme judicial district of Texas in a cause lately pending in said court, wherein the above-named party was appellant and J. M. Flack, who resides in Wilbarger county, Texas, was appellee (whose attorney, J. A. Lucky, resides in Vernon, in said county), and who herein will be styled defendant in error, and as ground therefor would respectfully show:

That the plaintiff in error, on the 27th day of April, 1898, instituted suit in the district court of Wilbarger county, Texas, to recover from the defendant in error section No. sixty, in block No. four, H. & T. C. R'y Co. survey, in Wilbarger county, Texas, located by virtue of certificate No. 1048, and surveyed for common-school purposes; that one D. B. Phillips made application to purchase said land, and that same was awarded to him and settled thereon as was required, and after three years' residence sold to plaintiff in error. The aliquot proportion of principal required was paid and obligation stipulating for deferred payments of principal and interest entered into. This interest was regularly paid up to January, 1893, and since then none has been paid; but later there was a tender to pay this overdue interest. For this default the commissioner of the general land office sought to forfeit or rescind this contract of purchase on the 20th day of August, 1897, and in pursuance thereof the defendant in error made his file and application to purchase same, and the land was awarded to him; and the plaintiff in error contended that the act of the legis-
25 lature authorizing forfeiture when applied to this particular case was invalid. Mainly on this contention trial was had, and there was judgment rendered for the defendant in error. Tr., p. —. From this judgment the plaintiff in error appealed to the court of civil appeals for the second supreme judicial district and gave proper bond. Tr., p. —. Errors were assigned, and the case was duly and properly briefed in said court, and copies of said briefs containing the several errors assigned accompany this application; that, notwithstanding the errors that were pressed on the attention of the court of civil appeals in said brief, the said court affirmed the judgment of the trial court. A copy of this judgment of affirmance of the court of civil appeals and the opinion of the court, with its conclusions of law and fact, accompany this application. A motion for rehearing, especially calling the attention of the court of civil appeals to the errors hereinafter shown and complained of, was filed and submitted in said court in time, and a copy thereof is hereto appended.

There was an order refusing and overruling said motion, a copy of which also accompanies this application.

The plaintiff in error would respectfully show to this court that there are errors arising on questions of law, and that were material to the true and rightful determination of this cause, which led to and caused the judgment of the lower court and court of civil appeals, and they are in the main in the following particulars:

1st. In not concluding and holding as matter of law that the forfeiture made by the commissioner of the general land office in August, 1897, was void, in that it contravened the Constitution of the United States, which inhibits any State from passing any law impairing the obligation of a contract, as well as the constitution of the State of Texas to the same effect, because this land was pur-
chased from the State of Texas under the law regulating the
26 sale of school lands, enacted in 1885, which expressly provides that in any sales of school land made under that law

no forfeiture should be allowed for failure to pay interest, and the act of 1887 and all other acts authorizing the land commissioner to forfeit the sale of school lands for non-payment of interest, passed subsequent to the act of 1885, would impair the obligation of all contracts of sale made under the acts of 1885, and therefore, in so far as it relates to sales made under said act, said laws are unconstitutional and void.

For statement and for ready reference hereunder it may be said that the purchase of the land in controversy was made in November, 1885. The forfeiture was made on August 20th, 1897. See conclusions of court of appeals.

Acts 1883, p. 85, sect. 10.
Acts 1885, p. 13, sect. 9 & 10, approved Feb'y 16, 1885.
Acts 1885, p. 18, sect. 1, approved Feb'y 23rd, 1885.

The court of appeals was constrained to overrule this assignment by the opinion of this court in the case of Fristoe v. Blum, in 45 S. W. R., and claims it was there held it was within the power of the legislature to authorize the commissioner of the general land office to declere forfeitures for non-payment of interest in all such cases, irrespective of the law under which the rights of purchasers accrued.

It is true in that case the language is strong and broad in its scope and seems to strike hip and thigh everything that comes within its range, but we cannot believe it was intended thereby to forecast every case that might possibly arise under the many enactments on that subject and prescribe a formula by which every case should be measured, irrespective of the facts out of which it might arise. The facts, and consequently the reasoning, in that case we do not think apply to the case at bar. Our purchase was made in November, 1885, and the forfeiture had on the 20th day of August, 1897, the very day the act of that year went into effect. This act of the 23rd of February, 1885, which was the law in existence at the time our purchase was made, in November, 1885, prohibited
27 the forfeiture for failure to pay annual installments of principal or interest prior to the 1st of August after the same became due, and said failure to pay same "shall not cause a forfeiture of the rights of such holder in such land." This is entitled "An act to prevent the forfeiture of the rights of purchasers of public-school lands." Its language is plain. It cannot mean less.

When read in the light of the preceding act of February 16th, 1885, it is manifest the legislature could not have intended otherwise.

This act provided, and only seven days preceding the one above mentioned, that one-thirtieth of the principal shall be paid on the first day of each succeeding year, and interest, at the rate of five per cent., on the whole unpaid purchase-money from date annually, on or before the first of March of each year, and in the same section (nine) provided: "That if the payment of the annual installments of interest be made by the first of August succeeding the first day of March, when same became due, then no forfeiture shall result or be

taken for such delay." Then, to make matters doubly sure, the former act made the failure to pay principal or interest within the time named not only no ground for forfeiture, but declared such failure shall not cause a forfeiture of the rights of such holder.

So we insist the right to rescind in our case did not exist, and any subsequent law, though it pertained to the remedy, if it impaired the right, as it clearly would do in this case, it is equally obnoxious to the constitution. Bronson *v.* Kinzie, 1 How., 322. In fact, the same was held by this court on this question. Loan Association *v.* Hardy, 26 S. W. R., 497.

The act of 1883 (page 88, section 10) made no such inhibition to the purchasers thereunder, but simply declared, if on the first day of March of any year the interest due remains unpaid, the
28 custodian of the obligation shall endorse thereon, "Lands forfeited." So the repeal of that law left the common-law right to rescind in force, and it only remained for the legislature to designate some officer to carry into effect that right, and this was done by the act of April first, 1887.

So, bearing in mind that the act of 1883, under which the purchase was made in the Fristoe case, had no provision forbidding forfeitures, whilst the act of February 23rd, 1885, under which the purchase in the case at bar was made, did have, and was made imperative, the contrast between the two cases is patent and the substantial rights thereunder distinct; nor do we believe it can be gainsayed but that the latter case comes clearly within the constitutional inhibition for which we contend.

2nd. In not concluding and holding as matter of law that the commissioner of the general land office had forfeited the land in controversy for failure in the payment of interest at a time when he was not authrized by law to do so, because the act of 1897 gave appellant until the first of November to pay all interest in arrears, and only provided for the forfeiture for the non-payment of interest after the first of November, 1897. Acts of 1897, page 39. This act took effect on the 20th of August, 1897, the day the forfeiture herein was made, and extended time to first of November. The right to rescind on the 1st Nov., 1896, under the act of 1895, was waived by failure to exercise the right in reasonable time, and hence the right could only be exercised under act of 1897, and then, under holding of this court, this was prematurely done, viz., on 20th Aug., 1897, and day this act went into effect. Acts of 1895, page 67. This extends time to Nov. 1.

3rd. In not concluding and holding as matter of law that the plaintiff in error had tendered to the treasurer of the State of Texas past-due interest within the time required by law, and that no rights of third parties could have intervened, since all the interest
29 in arrear had been tendered within the ninety days given by law.

Acts 1897, art. 4218*f*, p. 184.
Acts 1897, p. 39.

4th. In not concluding and holding as matter of law that, as time

was not of the essence of the contract of sale, by the sale of the land in controversy the State had no right to rescind the contract summarily, and the act of 1887, nor any other act, could give the State any such right without impairing the obligation of the contract, because the acts of the legislature of 1885 regulating the sale of school lands expressly provided that the time for payment of interest was not of the essence of the contract, and only in cases where time is of the essence of the contract does the right of summary rescission vest in the vendor, and therefore, in so far as applied to this sale, the law authorizing rescission would be invalid, as it would impair the obligation of the contract between Phillips and the State.

5th. In not concluding and holding as matter of law that the State had waived its right to summary rescission by extending the time for payments of the annual installments of interest, because the State since the year 1893, when default was first made in the payments of interest on the land in controversy, has repeatedly extended the time for the payment of said interest, and thereby waived the right to summary rescission.

We beg to refer the court to the brief accompanying this application for authorities under the last two assignments, and, in addition to the argument therein presented, invite the court's attention to some additional authorities on the question of summary rescissions of contracts and waivers of that right when not promptly exercised. In the case of Tom *v.* Wollhoefer, 61 Texas, 281, Judge Willie, delivering the opinion, says: "The vendor's remedy by rescission is a harsh and stringent one, especially when a part of the consideration has been paid and it is sought to forfeit the payment and recover or resell the land; hence slight circumstances are seized upon to protect the vendee against the forfeiture of the amount paid or compel the vendor to seek redress by suit for the balance due upon the purchase-money. He must not delay too long in insisting upon the payment of the money as it falls due, or he will be considered as having waived the default." The record herein shows a perfect compliance with the law up to 1893. That part of the principal required was paid, and the annual installments of interest for five years, up to 1893, was paid regularly, and, in addition, there has been tender of the full amount remaining due. There *has* been constant extensions of time in these payments by the State, and hence, in the light of this case, a waiver of the summary right to rescind, and would certainly at least have entitled the vendee to demand and notice. When the vendee has paid part of the purchase-money and given his notes for the balance, it is a familiar, equitable rule, before the vendor can rescind he must return or offer to return money paid.

In Phillips *v.* Hearndon, 78 Tex., 378, it was held: In contract for sale of land, when the vendee has paid part of the purchase-money, the vendor must give the vendee notice before revoking the contract.

When there has been part performance by the vendee, as paying portion of the purchase-money or taking possession and making improvements under the contract, he is entitled to reasonable notice of

the vendor's intention to rescind. Kennedy *v.* Embry, 72 Tex., 390.

The remedy for rescinding an executory contract is not favored. Slight circumstances may suffice to show a waiver by the vendor of the right. Moore *v.* Gisecke, 76 Tex., 544; Redden *v.* Smith, 65 Tex., 28.

We might multiply authorities indefinitely on this proposition, but it would serve no good purpose if the foregoing are not ample.

31 Whilst we in no manner waive the other assignments in this case and believe we are right in the first contention in this case, yet, should the court not agree with us, we beg respectfully to insist on the application of this doctrine of waiver, &c., in reference to the rescission of executory contract, and we are wholly unable to conceive any good reason why these rules should be applied by this court in ordinary cases and make an exception in this class. The record discloses all the facts to bring this case clearly within these rules, and if it did not, the presumption would be indulged that Phillips, the original purchaser, entered into possession and made improvements thereon—made it his home—as this court judicially knows he was required to do.

And again it must be clear—must be patent—by the tender herein shown to pay all deferred interest that it was by some oversight or mistake that there was failure to pay when the interest matured.

Wherefore we respectfully submit the writ herein applied for ought to be granted and this cause reversed and — rendered for plaintiff in error on such conditions as the court may deem proper to impose.

F. P. McGHEE,
A. A. HUGHES, &
W. W. FLOOD,
Attorneys for W. T. Waggoner, Plaintiff in Error.

CLERK'S OFFICE, SUPREME COURT.

I, Charles S. Morse, clerk of the supreme court of Texas, hereby certify that the above and foregoing six pages contain a true and correct copy of the original application for writ of error, No. 2442, entitled W. T. Waggoner *vs.* J. M. Flack, from Wilbarger county, second district, and that said application was by said supreme court refused on the 16th day of November, A. D. 1899.

Witness my hand and the seal of the supreme court of
[L. S.] Texas this the 4th day of August, A. D. 1900.

CHAS. S. MORSE, *Clerk.*

Filed in court of civil appeals Aug. 8, 1900.

W. L. HUFF, *Clerk.*

32 *Order of Supreme Court Refusing Writ of Error.*

In Supreme Court of Texas, Second District.

W. T. WAGGONER
vs.
J. M. FLACK.

NOV'R 16, 1899.

This day came on to be heard the application of W. T. Waggoner for a writ of error to the court of civil appeals for the second district, and, the same having been duly considered, it is ordered that said application be refused; that the applicant, W. T. Waggoner, and his sureties, T. M. Holt and J. H. Houssels, pay all costs incurred on this application.

I, Charles S. Morse, clerk of the supreme court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by said court on said application for a writ of error.

Witness my hand and the seal of said court this the 16th
[L. S.] day of November, A. D. 1899.

CHAS. S. MORSE, *Clerk.*

Filed in court of civil appeals Aug. 9, 1900.

W. L. HUFF,
Clerk 2nd Supreme Judicial District.

Bill of Costs in Supreme Court.

W. T. WAGGONER
vs.
J. M. FLACK.
No. 2442. Certified Copy Bill of Costs, Supreme Court.

CLERK'S OFFICE, SUPREME COURT.

Filing application	.50
Docketing petition	.50
Entering appearance of counsel	.50
Filing two briefs	.60
Filing three papers	.90
33 Entering orders	.50
Entering judgment on application	1.00
Certified copy of judgment	1.00
Taxing costs of application	.50
Certified copy of bill of costs	1.00
Total	$7.00

I, Charles S. Morse, clerk of the supreme court of Texas, hereby certify that the above copy of the original bill of costs is true and correct.

Witness my hand and the seal of said court, at Austin,
[L. S.] this the 16th day of November, 1899.

CHAS. S. MORSE, *Clerk.*

Filed in court of civil appeals Aug. 9, 1900.

W. L. HUFF,
Clerk 2nd Supreme Judicial District.

Petition for Writ of Error to U. S. Supreme Court.

In the Court of Civil Appeals, Second Supreme Judicial District of Texas.

W. T. WAGGONER, Plaintiff in Error,
vs.
J. M. FLACK, Defendant in Error.

Petition for writ of error.

To the Honorable T. H. Conner, chief justice of the court of civil appeals of the second supreme judicial district of Texas, at Fort Worth:

Now comes W. T. Waggoner, hereinafter styled plaintiff in error, and complaining of J. M. Flack, hereinafter designated as defendant in error, with respect shows that plaintiff in error is a resident citizen of Wise county, Texas, and that said defendant in error is a resident citizen of Wilbarger county, Texas, and that his attorney of record herein is J. A. Lucky, who resides in the town of Vernon, in Wilbarger county, Texas.

Plaintiff presents this his application for writ of error from
34 the Supreme Court of the United States to this honorable court, and to show that said Supreme Court has jurisdiction to entertain an appeal herein by writ of error and to determine and consider the several matters complained of in the assignments of error filed herewith, and to further shows that the honorable chief justice of this court has power and authority to grant this application, plaintiff respectfully represents:

That this suit was filed in the district court of Wilbarger county, Texas, by plaintiff in error against defendant in error on the twenty-seventh day of April, eighteen hundred and ninety-eight, and was tried before that court, without a jury, on the twenty-ninth day of September, eighteen hundred and ninety-eight, on which said trial defendant in error prevailed; whereupon plaintiff in error took an appeal upon an agreed statement of facts to the court of civil appeals of the second supreme judicial district of Texas, at Fort Worth, and the same was, after due hearing and submission, decided by said court on the 24th day of June, eighteen hundred and ninety-nine, and so resulted that the judgment of the said district court was affirmed.

Plaintiff in error filed his motion for a rehearing in said court of appeals on the seventh day of July, eighteen hundred and ninety-nine, assigning errors therein, as hereinafter in substance shown and by the record made manifest, and said motion was on the — day of ——, 1899, *was* in all things overruled; that thereafter, and within the time prescribed by law, plaintiff in error presented his

application for a writ of error to the supreme court of the State of Texas, complaining of the errors set forth in said assignment of errors filed herewith, but that said application, on the sixteenth day of November, eighteen hundred and ninety-nine, was refused, and said supreme court of Texas refused to take jurisdiction of this cause, as shown by copy of its judgment filed amongst the papers in this cause.

Plaintiff shows that the decision of the honorable court of
35 civil appeals of Texas was adverse to him, and that said decision was the denial of a right claimed by him under the Constitution and laws of the United States, as shown by the following—

Statement of the Nature and Result of this Cause.

This was an action of trespass to try title, brought by plaintiff against defendant to recover from him section No. 60, block No. 4, H. & T. C. R. R. Co. survey in Wilbarger county, Texas, of the value of $2,500.00.

The land in controversy was a school section properly filed and settled on by D. B. Phillips, who after three years' residence thereon sold to the plaintiff in error. Phillips' application to purchase same was made on 30th November, 1885, and it was duly awarded him. The proper aliquot proportion of principal required by law was paid and obligation stipulating for deferred payments of principal and interest entered into. The interest was regularly paid up to January, 1893, and since then none has been paid, but latterly there was a tender to pay this overdue interest. For this default in the payment of interest and for no other cause the commissioner of the general land office sought to forfeit or rescind this contract of purchase on the 20th August, 1897, and replaced the land again on the market for sale, and in pursuance thereof the defendant in error made his file and application to purchase same, and the land was awarded to him; but by an act of the legislature of Texas enacted on the 23rd day of February, 1885, and which was in full force and had been in no manner changed or repealed when Phillips made his purchase in November, 1885, it was especially provided "that the failure of the holder of any of these lands under contract of purchase from the State to make the annual payments thereon prior to the first day of August after the same becomes due shall not cause a forfeiture of the right of such holder in such land."

But by a subsequent act of the legislature the commissioner
36 of the general land office was authorized to make summary forfeitures of these contracts of purchase when the interest had not been paid.

Plaintiff in error, who succeeded to the rights of Phillips, contended that this subsequent act of the legislature, under which a summary forfeiture or rescission of his contract of purchase was sought to be had, could not be applied to his contract, because it would abridge his rights and impair the obligation of his contract made under an act which inhibited such forfeitures, and for that

reason was in conflict with section 10, art. 1, Constitution of the United States.

Plaintiff's contention in this behalf was overruled, as well in the district court as in the court of civil appeals and the supreme court, and, being denied all relief whatever, he complains thereof and says that said errors as set forth in his assignment of errors filed herewith were committed to his prejudice.

Wherefore plaintiff in error prays that a writ of error may be allowed in this behalf to the court of civil appeals of the second supreme judicial district of Texas for the correction of the errors so complained of, and that the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

W. W. FLOOD,
Attorney for Plaintiff in Error, W. T. Waggoner.

In the Court of Civil Appeals, Second Supreme Judicial District.

W. T. WAGGONER, Appellant,
vs.
J. M. FLACK, Appellee.

This the — May came the appellant, by his attorney, and filed herein and presented to the chief justice of this court his petition and praying for the allowance of a writ of error intended to be urged by him, and praying also that the transcript of the record, proceedings, and papers upon which the judgment herein
37 was rendered, duly authenticated, may be sent to the Supreme Court of the United States, at the seat of government, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the court does allow the writ of error upon the appellant, W. T. Waggoner, giving bond accordingly in the sum of five hundred dollars, which may operate as a cost bond.

T. H. CONNER,
Chief Justice of the Court of Civil Appeals in and for the Second Supreme Judicial District of Texas.

I, W. L. Huff, clerk of the court of civil appeals of the second supreme judicial district of Texas, do hereby certify that T. H. Conner, whose name is subscribed to the foregoing order, was at the time of subscribing same chief justice of the court of civil appeals of the second supreme judicial district of Texas, duly commissioned and qualified, and that full faith and credit are due to all his official acts as such.

In testimony whereof I have hereunto set my hand and
[L. S.] affixed the seal of said court, at Fort Worth, Texas, this 8th day of August, A. D. 1900.

W. L. HUFF,
Clerk of the Court of Civil Appeals in and for the Second Supreme Judicial District of Texas.

Filed in court of civil appeals Aug. 9, 1900.

W. L. HUFF,
Clerk 2nd Supreme Judicial District.

38 *Citation.*

UNITED STATES OF AMERICA:

The President of the United States to J. M. Flack, Wilbarger county, Texas, and J. A. Lucky, his attorney, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, to be held in the city of Washington, District of Columbia, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the court of civil appeals for the second supreme judicial district of Texas, at Fort Worth, wherein W. T. Waggoner is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 1st day of August, nineteen hundred, and of the Independence of the United States the one hundred and twenty-fourth.

T. H. CONNER,
Chief Justice of the Court of Civil Appeals,
Second Supreme Judicial District of Texas.

Attest: W. L. HUFF, *Clerk.* [L. S.]

I accept service of the foregoing citation this August 1st, 1900.

J. A. LUCKY,
Attorney of Record for J. M. Flack, Defendant in Error.

Filed in court of civil appeals Aug. 9, 1900.

W. L. HUFF,
Clerk 2nd Supreme Judicial District.

39 *Assignment of Errors.*

W. T. WAGGONER, Plaintiff in Error,
vs.
J. M. FLACK, Defendant in Error.

The plaintiff in error in this cause, in connection with his petition for writ of error to the court of civil appeals for the second supreme judicial district of Texas, makes and submits the following assignment of errors, which he avers occurred upon the hearing of said cause in said court:

1st. In not concluding and holding as a matter of law that the forfeiture of the contract of purchase of D. B. Phillips of the land in controversy, made by the Commissioner of the General Land Office

in August, 1897, was void, in that it contravenes section 10, article 1, Constitution of the United States, which inhibits a State from passing any law impairing the obligation of a contract, because this land was purchased by Phillips from the State of Texas under a law enacted by the State in 1885, which especially prohibited forfeitures of such sales for non-payment of interest, and all legislation subsequent thereto, such as the acts of 1895 and 1897, authorizing such forfeitures for non-payment of interest, would and did impair the obligation of his contract made under this act of 1885.

And hence the act of the legislature of the State of Texas under which the commissioner acted in this particular was unconstitutional and void,

2nd. There was error in the judgment of the court of civil appeals in affirming the judgment of the district court of Wilbarger county, and said judgment should have been in favor of the plaintiff in error herein instead of the defendant in error.

Whereupon the plaintiff in error prays said judgment may be reversed.

W. W. FLOOD,

40 *Attorney for Plaintiff in Error, W. T. Waggoner.*

Filed in court of civil appeals Aug. 9, 1900.

W. L. HUFF,
Clerk 2nd Supreme Judicial District.

Bond.

In the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Fort Worth, Texas.

W. T. WAGGONER, Appellant,
vs.
J. M. FLACK, Appellee.

Know all men by these presents that we, W. T. Waggoner, as principal, and —— —— and —— ——, as sureties, are held and firmly bound unto J. M. Flack in the full and just sum of five hundred dollars, to be paid to the said J. M. Flack, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 21st day of June, 1900.

Whereas the above-named appellant has sued out a writ of error to the Supreme Court of the United States to reverse the judgment in the above-entitled cause by the court of civil appeals for the second supreme judicial district of Texas:

Now, therefore, the condition of this obligation is such that if the above-named W. T. Waggoner shall prosecute said writ to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

W. T. WAGGONER.
M. B. LOYD.
S. B. BURNETT.

41 The foregoing is hereby approved this 19th day of July, 1900.

T. H. CONNER,
Chief Justice of the Court of Civil Appeals,
Second Supreme Judicial District of Texas.

Filed in court of civil appeals Aug. 9, 1900.

W. L. HUFF,
Clerk 2nd Supreme Judicial District.

Bill of Costs in Court of Civil Appeals.

W. T. WAGGONER
vs.
J. M. FLACK. } No. 3206. From Wilbarger County.

Filing record	.50
Docketing cause	.50
Appearances	1.00
Filing and entering motion	.35
Orders	2.00
Filing papers	2.80
Continuances	.20
Judgment	1.00
Taxing costs	.50
Mandate	1.50
Recording opinion	.75
Cert. copy bill of costs	.70
Certified copy of motion	2.00
Issuing writs	6.00
Issuing precept	1.50
Sheriff's fees	1.00
	$22.30
Costs at Ft. Worth	22.30
Trans. order	1.00
Cost on cert. question	11.90
Cost sup. court	7.30
Ex	.50
	$43.00
Transcript sent Supreme Court of United States	20.00
Total	$63.00

42 *Clerk's Certificate.*

Clerk's office, court of civil appeals, second supreme judicial district.

I, W. L. Huff, clerk of the court of civil appeals for the second supreme judicial district of Texas, hereby certify that the foregoing are true and correct copies of all proceedings had in the district

court of Wilbarger county, in this court, and in the supreme court in the cause of W. T. Waggoner *versus* J. M. Flack, as shown by the records of my office.

Witness my signature and the seal of said court, at office, in the city of Fort Worth, Texas, on this the 13th day of August, A. D. 1900.

[Seal Court of Civil Appeals of the State of Texas.]

W. L. HUFF,
Clerk Court of Civil Appeals,
Second Supreme Judicial District of Texas.

43 UNITED STATES OF AMERICA:

The President of the United States to the honorable the judges of the court of civil appeals for the second supreme judicial district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of civil appeals for the second supreme judicial district of Texas, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between W. T. Waggoner, appellant and plaintiff in error, and J. M. Flack, appellee and defendant in error, wherein was drawn in question the validity of a statute of said State (and an authority exercised thereunder), on the ground of their being repugnant to the Constitution and laws of the United States, and the decision was in favor of such their validity, a manifest error hath happened, to the great damage of the said W. T. Waggoner, plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send said record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the — day of —— next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error that of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 21st day of July, nineteen hundred.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Ft. Worth.]

J. H. FINKS, *Clerk,*
By J. B. FINKS, *Deputy.*

44 Allowed this 21st day of July, nineteen hundred.

T. H. CONNER,
Chief Justice Court of Civil Appeals, Second Supreme Judicial District of Texas, at Fort Worth, Texas.

Clerk's office, court of civil appeals, second supreme judicial district.

In pursuance of the command of the within writ of error I, W. L. Huff, clerk of the court of civil appeals for the second supreme judicial district of Texas, herewith transmit to the Supreme Court of the United States, at Washington, the record and proceedings therein named, with all things concerning the same.

Witness my signature and the seal of said court, at office, in the city of Fort Worth, Texas, on this the 13th day of August, A. D. 1900.

[Seal Court of Civil Appeals of the State of Texas.]

W. L. HUFF,
Clerk Court of Civil Appeals, Second Supreme Judicial District of Texas.

45 [Endorsed:] W. T. Waggoner, plaintiff in error, *vs.* J. M. Flack, defendant in error. Writ of error. Filed in court of civil appeals Aug. 9, 1900. W. L. Huff, clerk 2nd supreme judicial district.

Endorsed on cover: File No., 17,890. Texas court of civil appeals, 2nd supreme judicial district. Term No., 405. W. T. Waggoner, plaintiff in error, *vs* J. M. Flack. Filed August 27th, 1900.